

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DANIEL MEREDITH**  
Claimant

VS.

**FRANCIS CASING CREW, INC.**  
Respondent

AND

**LIBERTY MUTUAL INSURANCE**  
Insurance Carrier

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Docket No. 1,004,553

**ORDER**

Claimant appeals the March 19, 2003 preliminary hearing Order of Administrative Law Judge Pamela J. Fuller. Claimant was denied benefits after it was determined that he was in violation of K.S.A. 44-501(d)(2).

**ISSUES**

Is claimant entitled to temporary total disability benefits, medical treatment and payment of medical expenses?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be affirmed.

Claimant began working for respondent on its oil well drilling facility in May 2001. On May 5, 2002, claimant was contacted regarding a job in Forgan, Oklahoma. Claimant drove a company flatbed truck to the location of the drilling site. Accompanying claimant was a coworker named Jason Battaglear. Claimant testified they worked the entire night, finishing approximately 11:30 a.m. the next morning. Claimant and Mr. Battaglear then

proceeded from Forgan, Oklahoma, to Garden City, Kansas. Shortly after crossing the Oklahoma border on Kansas Highway 23, claimant and Mr. Battaglear were involved in a single-vehicle accident. As a result, Mr. Battaglear was killed, and claimant suffered substantial injuries.

A landscaper out of Meade, Kansas, named John Carmicheal, was traveling north on Kansas Highway 23 on the date of the accident. He testified that he was passed by claimant's vehicle, with claimant's vehicle traveling at a high rate of speed and weaving all over the road. Mr. Carmichael testified that claimant's vehicle was "on the left-hand side more than they were on the right-hand side."

Mr. Carmichael followed claimant's vehicle for approximately three miles, losing sight of it over a hill. By that time, claimant's vehicle was between a half and three-quarters of a mile ahead. After coming over the top of the hill, Mr. Carmichael discovered that the vehicle had left the road and crashed into a streambed.

Josh Biera, a Kansas Highway Patrol trooper who investigated the accident, testified that there were approximately 650 feet of skid marks in the grass prior to the truck crashing upside down and catching on fire. There was no indication that claimant braked at any time.

Claimant was transported to the hospital where, in the normal course of hospital procedure, a blood alcohol and drug screen was ordered. The toxicology screen, identified as a 7-A (indicating that seven drugs and alcohol were being tested), was performed at approximately 6:00 p.m., May 6, 2002. As a result of the testing, claimant was found to have no alcohol in his system, but tested positive for methamphetamine. Claimant's test results registered at greater than 4000 ng/ml.

Trooper Biera testified that he gave claimant the consent advisories identified as Forms DC-27 and DC-60. These advisories are required to be given before blood and alcohol testing are performed after an accident.

Heather Cox, a tester for AMS Laboratories, testified that any time a trauma or accident occurred, it was normal hospital procedure to order the 7-A basic test.

Claimant acknowledged at both his deposition and at preliminary hearing that he had been doing drugs for a period of time. He had been fired from an earlier job for possessing marijuana on the employer's premises. He also acknowledged that he used methamphetamine on a regular basis when going out on a job for respondent. He testified that use of the methamphetamine increased his energy level and allowed him to function with substantially less sleep than normal.

K.S.A. 44-501(d)(2) states in part:

The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other components or substances, including but not limited to, any drugs or medications which are available to the public without prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. . . . It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
... Methamphetamine 3 .....	500
...	

An employee's refusal to submit to a chemical test shall not be admissible evidence to prove impairment unless there was probable cause to believe that the employee used, possessed or was impaired by a drug or alcohol while working. The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

In this instance, there is testimony verifying that claimant was traveling at a high rate of speed and driving erratically immediately before the accident. The medical tests performed indicated a very high level concentration of methamphetamine in his system at the time of the accident. By claimant's own testimony, he acknowledged smoking

methamphetamine on a regular basis when going on a job. The 4000 ng/ml level found in claimant's system is eight times the minimum level allowed by K.S.A. 44-501(d)(2).

Claimant contends, under K.S.A. 44-501(d), that test results not be admitted unless there was "probable cause to believe that the employee used, had possession of, or was impaired by a drug or alcohol while working." In this instance, there is evidence from witness testimony of claimant's erratic, high-speed driving shortly before the accident.

K.S.A. 44-501(d)(2)(A) requires probable cause to believe the employee used, had possession of or was impaired by drugs or alcohol while working, but makes no obligation that this probable cause be respondent's. Here, the Highway Patrolman investigating the accident, Trooper Biera, expressed significant concern regarding what he found at the scene and what he discovered while speaking to the witnesses at the scene. The witness statements (taken approximately 2:10 and 3:00 in the afternoon of the accident) were taken roughly three to four hours prior to the test being administered to claimant. Additionally, Trooper Biera provided claimant the consent advisory statements required when samples of blood and urine are to be taken after an accident.

The Workers Compensation Act does not define "probable cause." The Board has, however, previously held that "the phrase means having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker."<sup>1</sup>

Probable cause means "reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining."<sup>2</sup>

Probable cause has been defined by the Kansas appellate court as "the existence of evidence . . . which would lead a reasonable person, properly informed and advised, to conclude . . ."<sup>3</sup>

Unless an employer demonstrates that there was probable cause to believe that an employee used, had possession of, or was impaired by drugs or alcohol while working, the result of a test of the employee's blood alcohol concentration at

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<sup>1</sup> *Evans v. Frakes Trucking*, No. 234,610, 2001 WL 1669673 (Kan. WCAB Nov. 30, 2001) (affirmed by the Kansas Court of Appeals in *Evans v. Frakes Trucking*, 31 Kan. App. 2d 211, 64 P.3d 440 (2002).)

<sup>2</sup> *Lindenman v. Umschied*, 255 Kan. 610, 875 P.2d 964 (1994).

<sup>3</sup> *In re Estate of Campbell*, 19 Kan. App. 2d 795, 876 P.2d 212 (1994), Comment j of Restatement (Second) of Property § 9.1.

the time of an injury is inadmissible and no conclusive presumption of alcohol impairment arises under K.S.A. 1997 Supp. 44-501(d)(2).<sup>4</sup>

If the legislature had intended the result of every blood test to be admissible without independent establishment of some level of suspicion of alcohol use, possession, or impairment, the probable cause requirement would not have been included in the statute as one of the conditions of admissibility.<sup>5</sup>

Here, the Board finds that there was probable cause to believe that claimant was impaired by either drugs or alcohol at the time of the accident.

K.S.A. 44-501(d)(2) states that it shall be conclusively presumed that the employee was impaired if the test results exceed those listed in the statute. Claimant's methamphetamine level of greater than 4000 ng/ml is at least eight times the level stated in the statute. Therefore, there is a conclusive presumption that claimant was impaired due to drugs at the time of the accident. The Board, therefore, finds the determination by the Administrative Law Judge to deny claimant benefits under the Workers Compensation Act should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Pamela J. Fuller dated March 19, 2003, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2003.

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BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant  
Terry J. Malone, Attorney for Respondent  
Pamela J. Fuller, Administrative Law Judge  
Paula S. Greathouse, Director

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<sup>4</sup> *Evans, supra*, Syl. ¶ 4 at 211.

<sup>5</sup> *Id.* at 215.